Attorney Docket No. DST-10202/15

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES

Applicant: Richard J. Dibbs

Serial No.: 10/618,971 Group Art Unit: 3742

Filing Date: July 14, 2003 Examiner: Quang T. Van

For: EGG HANDLING PASTEURIZATION APPARATUS AND METHOD

SUPPLEMENTAL APPEAL BRIEF

Mail Stop Appeal Brief
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Responsive to the Order Returning Undocketed Appeal to the Examiner, dated September 27, 2007, as well as the Notifications of Non-Compliant Appeal Brief dated October 10, 2007 and October 24, 2007, Applicant presents the following Supplemental Corrected Appeal Brief:

1.0 Real Party in Interest.

The real party in interest in the present application is Pasteurization Technologies LLC, having an address at 350 Talon Center, Detroit, Michigan 48207, by assignment from Richard J. Dibbs and recorded with the PTO.

2.0 Related Appeals and Interferences.

No other appeals or interferences are known by Applicant to be pending and which will have any effect on the Board's decision in the pending appeal.

3.0 Status of Claims.

Claims 50-56, 86-97 and 100-109 remain pending in the application and are rejected by the Examiner's Final Office Action dated October 27, 2005. All of pending claims are being appealed.

4.0 Status of Amendments.

No amendments were filed following the issuance of the final rejection of October 27, 2005. The final rejection was precipitated by an Amendment filed by Applicant on September 12, 2005. A Pre-Appeal Brief was filed February 27, 2006, requesting review of final rejection.

5.0 Summary of Claimed Subject Matter.

The present invention as recited in independent claim 50 is an in-shell egg pasteurization system 10 (page 7, line 22, Fig. 1), having a spiral oven 32 (page 11, line 29, Fig. 1) configured to increase a temperature of an in-shell egg to a first predetermined temperature for a predetermined time interval (page 11, lines 22-24).

The present invention as recited in independent claim 56 is an in-shell egg pasteurization system 10 (page 7, line 22, Fig. 1) having a cavity (see again 32 on page 11, line 29, Fig. 1) configured to increase a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval (again page 11, lines 22-24). A packer 54 (page 10, lines 15-18) is configured to pack the in-shell egg, the egg entering the cavity prior to the packer (page 7, lines 29-34).

The invention recited in independent claim 100 is a method for pasteurizing an in-shell egg including the steps of performing a grading operation on the in-shell egg (page 7, line 30), and after the grading operation, transporting the egg in a continuously conveyed fashion within

an oven 32 , increasing a temperature of the in-shell egg to a first temperature for a time interval (page 11, lines 22-24) and packing the in-shell egg in a packer 54 (page 10, lines 15-18) after the temperature increasing step.

The invention recited in independent claim 107 is an in-shell egg pasteurization system, including a cavity 32 configured to increase a temperature of an in-shell egg in a continuously conveyed manner to an elevated temperature for a time interval (page 11, lines 22-24), an in-line and continuous grader 40 (page 8, line 4, Fig. 1 and page 10, lines 7-14) configured to grade the in-shell egg and the cavity 32 succeeding the grader 40 (Fig. 2).

The invention of dependent claim 51 further recites a cooler 34 (page 11, line 30, Fig. 2) arranged downstream of the oven 32 and configured to reduce the temperature of the in-shell egg to a second predetermined temperature in a range of between 45°F and 75°F (page 11, line 34).

The invention of dependent claim 55 recites the cooler 34 being configured to cool the in-shell egg for a time interval in a range of between 1 minute and 20 minutes (page 11, line 35).

The invention of dependent claim 101 recites the first predetermined temperature being in a range of between 120°F and 140°F (page 11, line 23).

The invention of dependent claim 86 recites a spiral cooler 34 (page 11, line 30) arranged downstream of the oven and configured to reduce the temperature of the in-shell egg to a second predetermined temperature in a range of between 45°F and 75°F (page 11, line 34).

6.0 Grounds of Rejection to be Reviewed on Appeal.

The issues presented for review are the Examiner's rejection of claims 50, 52-54 and 87 under 35 U.S.C. §102(b) as being anticipated by Hwang (USPN 5,078,120). Claims 56, 89-91, 94, 102 and 105-106 were rejected as anticipated by Polster (USPN 6,113,961). Claims 51, 55 and 101 were rejected under 35 U.S.C. §103 as obvious over Hwang in view of Ball et al. (USPN 6,455,094). Claim 86 was rejected as obvious over Hwang in view of Plemons (USPN 4,079,666). Claims 88, 92 and 97 were rejected as obvious over Polster in view of Ball. Claim 93 was rejected as obvious over Polster in view of Plemons. Claims 95, 100, 103 and 107-109 were rejected as obvious over Polster in view of Hwang. Claim 96 was rejected as obvious over Polster in view of Scharfman (USPN 3,830,945). Finally, claim 104 was rejected as obvious over Hwang in view of Scharfman.

7.0 Argument.

Group I – Claims 50, 52-54 and 87.

The rejection in relevant part states that Hwang discloses a cooking oven for slow cooking of food products comprising a spiral oven and which is configured to increase a temperature to a first predetermined temperature for a predetermined time level.

Hwang teaches a cooking oven of a generally spiralized configuration for the mass cooking of food products, such as chicken/poultry parts, hamburger/fish patties, vegetable foods and *other products* (see column 2, lines 43 et seq.), and which in particular utilizes steam and/or heated air to achieve varied cooking characteristics in the cooking process.

The in-shell egg pasteurization system of claim 50 differs in two fundamental respects from what is shown and described in Hwang. First, and notwithstanding the general reference to varied food items, Hwang nowhere teaches or suggests pasteurizing in-shell eggs.

Second, the act cooking as disclosed in Hwang is not pasteurizing as recited in the present invention. Specifically, and referencing the appended definitions of cooking and pasteurizing as set forth in dictionary.com, cooking is properly defined as "undergoing the application of heat especially for the purpose of later ingestion."

In contrast, pasteurizing is defined heating food in order to kill harmful microorganisms. Specifically, the act of pasteurizing lacks the protein denaturization of "cooking". The application of energy to kill harmful organisms within an egg and leaving the egg otherwise unchanged is the basis of the pending invention.

Respectfully, the Examiner is submitted as not having met his burden in establishing the anticipation of the claims, in particular claim 50, in the citation of Hwang.

Group II – Claims 56, 89-91, 94, 102 and 105-106.

The rejection states that Polster teaches a grader configured to grade an in-shell egg, an oven configured to increase a temperature of an in-shell egg to a first predetermined temperature and a packer to pack the egg. On page 4, paragraph 3, the Examiner further opined that Polster's disclosure includes a cavity "capable" of increasing a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval, thus meeting the claimed limitation.

In pointed response, claim 56 recites a **non**-batch egg pasteurization system employing a pasteurizing cavity prior to a packer. Polster nowhere teaches or suggests non-batch pasteurization in any fashion. To the contrary, the incorporation of individual flats (i.e., plural egg-holding trays) militates against the possibility of any type of non-batch process, which Applicant understands to be the "successive" treatment of in-shell eggs in a progressing fashion.

Furthermore, the Examiner references column 2, lines 26-33 as teaching the ability to pre-grade and separate the eggs in some fashion, prior to batch pasteurizing. Claim 56, as presently amended, does not recite grading.

Rather, claim 56 recites the step of packing the in-shell egg following in-cavity pasteurization. Nowhere does Polster disclose packing in any application to the batch process grading. Rather, Polster merely states that, following batch process heating, an unloader removes the eggs from the heating zone. Accordingly, the feature of an egg packer positioned downstream from a non-batch egg pasteurization cavity is not disclosed in Polster.

Group III – Claims 51, 55 and 101.

The features of dependent claims 51, 55 and 101 all depend from claim 50 discussed previously. These claims, respectively, recite a cooler located downstream from the spiral pasteurization oven for reducing the temperature of the in-shell egg to between 45°F and 75°F (claim 51), cooling the egg between 1-20 minutes (claim 55) and initial pasteurization heating in a range of 120°F to 140°F (claim 101).

Ball was combined with Hwang, according to the Examiner, to teach the provision of a cooler arranged downstream of an oven (directed to cooking rather than pasteurizing as has been established). The Examiner in particular references a graphical representation (see Fig. 25B, column 7, lines 14-18) and column 8, lines 58-65 which generally states that eggs can be cooled by exposing to temperatures below those required for pasteurization.

Reviewing Ball, it is a reference purely scientific in nature and does not teach or suggest a cooler arranged downstream (as specifically recited in claim 51) from a pasteurizing oven. The mere reference that it may be desirable to cool an egg following pasteurization, as admittedly

suggested by Ball, does not substantiate the incorporation of a cooler element into a line process for the purpose of establishing such cooling in a progressing egg pasteurization system.

Group IV – Claim 86.

Claim 86 recites a spiral cooler located downstream a pasteurizing oven and configured to reduce an in-shell egg to a second temperature of between 45°F to 75°F. Plemons was cited in combination with Hwang as teaching a spiral cooler arranged downstream of an oven.

In fact, Plemons teaches a conveyor fed and spiraled cooling chamber for reducing moisture content of pizza crusts, including surface treating with ethyl alcohol. Plemons, just as Hwang, has nothing to do with either pasteurizing or in-shell eggs.

In rejecting claims under 35 U.S.C. §103, the Examiner bears the initial burden of presenting a prima facie case of obviousness. See *In re Rijckaert*, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). A prima facie case of obviousness is established by presenting evidence that the reference teachings would appear to be sufficient for one of ordinary skill in the art having the references before him to make the proposed combination or modification. See *In re Litner*, 173 USPQ 560, 562 (CCPA 1972).

The conclusion that the claimed subject matter is prima facie obvious must be supported by evidence, as shown by some objective teaching in the prior art or by knowledge generally available to one of ordinary skill in the art that would have led that individual to combine the relevant teachings of the references to arrive at the claimed invention, see again *In re Fine*, 837 F.2d 1071, 1074, 5 USPQ2d, 1596, 1598 (Fed. Cir. 1988).

Rejections based on §103 must rest on a factual basis with these facts being interpreted without hindsight reconstruction of the invention from the prior art. The Examiner may not, because of doubt that the invention is patentable, resort to speculation, unfounded assumption or

hindsight reconstruction to supply deficiencies in the factual basis for the rejection. Rather, and when satisfying the burden of showing obviousness of the combination, the Examiner can show some objective teaching in the prior art or knowledge generally available to one of ordinary skill in the art which would lead that individual to combine the relevant teachings of the references. *In re Lee*, 61 USPQ2d 1430, 1434 (Fed. Cir. 2002), citing *In re Fritch*, 23 USPQ2d 1780, 1783 (Fed. Cir. 1992). Broad conclusory statement regarding the teaching of multiple references, standing alone, are not "evidence"; *In re Dembiczak*, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999). Mere denials and conclusory statements, however, are not sufficient to establish a genuine issue of material fact. *Dembiczak*, 50 USPQ2d at 1617, citing *McElmurry v. Arkansas Power & Light Co.*, 27 USPQ2d 1129, 1131 (Fed. Cir. 1993).

Applying the above analysis, it is submitted that the citation of an alcohol based pizza crust cooling mechanism (Plemons) combined with a poultry cooking oven (Hwang) does not render obvious the in-shell egg pasteurization system (claim 50) further reciting a downstream located spiral cooler (claim 86) for progressively cooling the in-shell eggs.

Group V – Claims 88, 92 and 97.

Having previously examined both Polster and Ball, the rejection states that the Polster discloses all of the features of the claimed invention with the exception of the cooler arranged downstream of the oven, and that Ball further discloses a cooler (70) arranged downstream of the oven and configured to reduce the temperature of the eggs.

In response, there is no item 70 in Ball (it is suspected that the reference to Plemons was intended). Furthermore, the general technical description of cooling eggs as taught in Ball does not support the holding of obviousness based upon Ball providing a downstream located cooler.

Group VI – Claim 93.

The rejection states that it would have been obvious to incorporate a spiral cooler (e.g. the pizza crust cooler of Plemons previously described) into an egg pasteurizing (batch oven process as in Polster) to render obvious the spiral cooler arrangement of claim 93 dependent from claim 56. Applicant again argues a lack of support in maintaining this rejection, again noting the deficiencies in the individual references discussed above.

Group VII – Claims 95, 100, 103 and 107-109.

This is essentially a "mix and match" or "grab bag" rejection, wherein the Examiner is combining the batch pasteurization of Polster with the poultry product cooking oven in Hwang and merely stating the obviousness of modifying Polster to permit pasteurizing a plurality of objects at the same time while passing (them) through the oven.

Of note, the method of claim 100 or the system of claims 107-109 do not even recite the feature of a spiral oven relied upon in the rejection. Rather, these claims recite a continuously conveying system for grading, pasteurizing and packing in-shell eggs.

Systematic throughout the Examiner's rejections is the failure to carefully address each claim being rejected, or to adequately identify the proper reference being relied upon to sustain the rejection. Accordingly, and in response, Applicant merely realleges the Examiner's failure to support the rejection of the claims as being obvious.

Group VIII – Claim 96.

The rejection cites the microwave energy generator in Scharfman in combination with the batch pasteurization process of Polster. Neither reference teaches or suggests the microwave oven of claim 96 in cooperation with the non-batch system of claim 56 including the subsequent packer. Again, neither Polster nor Scharfman teach a packer at any step of the system.

Group IX – Claim 104.

The rejection combines the egg microwave cooker of Scharfman with the meat/poultry cooking oven of Hwang, and as supporting the application of a microwave oven (claim 104) into the spiral oven based egg pasteurization system of claim 50. Once more, it is not seen how the microwave precooking/sterilizing device of Scharfman suggests application to the spiral poultry cooker in Hwang.

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Respectfully submitted,

Douglas J. McEvoy
Registration No. 34,385
Gifford, Krass, Groh, Sprinkle,
Anderson & Citkowski, P.C.
2701 Troy Center Drive, Suite 330
P.O. Box 7021
Troy, MI 48007-7021
(248) 647-6000

Attorney for Appellant

CLAIMS APPENDIX

50. An in-shell egg pasteurization system, comprising a spiral oven configured to increase a temperature of an in-shell egg to a first predetermined temperature for a predetermined time interval.

51. The system according to claim 50, further comprising a cooler arranged downstream of the oven and configured to reduce the temperature of the in-shell egg to a second predetermined temperature in a range of between 45°F and 75°F.

52. The system according to claim 50, wherein the predetermined time interval is between 10 minutes and 120 minutes.

53. The system according to claim 50, wherein the oven includes a heating medium.

54. The system according to claim 53, wherein the heating medium includes at least one of hot air and steam.

55. The system according to claim 51, wherein the cooler is configured to cool the in-shell egg for a time interval in a range of between 1 minute and 20 minutes.

56. An in-shell egg pasteurization system, comprising:

a cavity configured to increase a temperature of an in-shell egg in a non-batch manner to an elevated temperature for a time interval;

a packer configured to pack the in-shell egg; and

the egg entering the cavity prior to the packer.

86. The system according to claim 50, further comprising a spiral cooler arranged downstream of the oven and configured to reduce the temperature of the in-shell egg to a second predetermined temperature in a range of between 45°F and 75°F.

87. The system according to claim 50, wherein the predetermined time interval is between 10 and 90 minutes.

88. The system according to claim 56, further comprising a cooler arranged downstream of the temperature increasing cavity and configured to reduce the temperature of the in-shell egg to a further temperature in a range of between 45°F and 75°F.

89. The system according to claim 56, wherein the time interval is between 10 minutes and 120 minutes.

90. The system according to claim 56, wherein the temperature increasing cavity includes a heating medium.

91. The system according to claim 90, wherein the heating medium includes at least one of hot air and steam.

92. The system according to claim 88, wherein the cooler is configured to cool the in-shell egg for a time interval in a range of between 1 minute and 20 minutes.

93. The system according to claim 56, further comprising a spiral cooler arranged downstream of the temperature increasing cavity and configured to reduce the temperature of the in-shell egg to a further temperature in a range of between 45°F and 75°F.

94. The system according to claim 56, wherein the time interval is between 10 and 90 minutes.

95. The system according to claim 56, wherein the temperature increasing cavity includes a spiral oven.

96. The system according to claim 56, wherein the temperature increasing cavity includes a microwave oven.

97. The system according to claim 56, further comprising, arranged at least one of (a) upstream and (b) downstream of the temperature increasing cavity, at least one of (a) an orientor configured to orient the in-shell egg, (b) an egg washer configured to wash the in-shell egg, (c) a dirt detection and removal device configured to detect dirt on a surface of the in-shell egg and remove the in-shell egg in accordance with the detection of dirt on the surface of the in-shell egg, (d) a blood detection and removal device configured to detect blood inside the in-shell egg and to remove the in-shell egg in accordance with the detection of blood inside the in-shell egg, (e) a

crack detection and removal device configured to detect a crack in the in-shell egg and to remove the in-shell egg in accordance with the detection of a crack in the in-shell egg, (f) a preheater configured to preheat the in-shell egg, (g) a sizer configured to determine a size of the in-shell egg, (h) a dryer configured to dry the in-shell egg and (i) a cooler configured to cool the in-shell egg.

100. A method for pasteurizing an in-shell egg, comprising:

performing a grading operation on the in-shell egg;

after the grading operation, transporting the egg in a continuously conveyed fashion within an oven, increasing a temperature of the in-shell egg to a first temperature for a time interval; and

packing the in-shell egg in a packer after the temperature increasing step.

101. The system according to claim 50, further comprising said first predetermined temperature being in a range of between 120°F and 140°F.

102. The system according to claim 56, further comprising said first predetermined temperature being in a range of between 120°F and 140°F.

103. The method as described in claim 100, further comprising the step of increasing the first predetermined temperature in a range of between 120°F and 140°F.

104. The system according to claim 50, wherein the oven further comprises a microwave generating oven.

105. The system according to claim 56, further comprising a grader configured to grade the in-shell egg.

106. The system according to claim 105, further comprising said grader transporting the in-shell egg to said packer.

107. An in-shell egg pasteurization system, comprising:

a cavity configured to increase a temperature of an in-shell egg in a continuously conveyed manner to an elevated temperature for a time interval;

an in-line and continuous grader configured to grade the in-shell egg; and

the cavity succeeds the grader.

108. The system according to claim 107, further comprising a packer configured to pack the in-shell egg.

109. The system according to claim 108, further comprising said grader transporting the in-shell egg to said packer.

EVIDENCE APPENDIX

No new evidence is being entered and relied upon in the appeal.

RELATED PROCEEDINGS APPENDIX

No copies are enclosed of any decisions rendered by a court or the Board in any proceeding identified in the related appeals and interferences section.